Tera Advanced Services Corporation *and* Daniel J. Malloy. Case 5-CA-11973

January 7, 1980

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 31, 1981, Administrative Law Judge Arthur Leff issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We agree with the Administrative Law Judge that the General Counsel has made a *prima facie* showing sufficient to support the inference that protected activity was a motivating factor in Respondent's decision to discharge employee Daniel Malloy. Contrary to the Administrative Law Judge, however, we do not find that Respondent has met its burden of establishing that it would have taken the same action even in the absence of Malloy's protected activity. We find, in agreement with the General Counsel, that Malloy's protected activity was the sole motivating factor in the decision, and that Respondent's other asserted reasons for the discharge were pretexts.

The record discloses that during his tenure of employment Malloy unquestionably had an inconsistent performance record, marked by several warnings concerning below-average attitude and productivity. In January 1980,[1] Supervisor George Petrov placed Malloy on probation after finding him to be the least accurate employee of his five-member coding team. Malloy was given a final warning after an evaluation on January 25 rated his performance below average. On Friday, February 1, however, Petrov found Malloy's most recent work acceptable, and concluded that a previous warning about socializing on the job had made an impression on him. Operations Manager Michael Seville approved Petrov's recommendation that Malloy's probationary period be extended and that no further action be taken against him at that time.

The Administrative Law Judge found that the "paycheck incident" also occurred on February 1, when employee Linda Robb, an assistant to Administrative Manager Dee Denton, handed Malloy his paycheck and W-2 form. Upset that the form did not contain his correct address, Malloy exclaimed, "Those dumb fuckers up front, they never do anything right. I ought to go up and kick Dee's ass." Although Robb immediately informed Denton of the incident, it is undisputed that Project Manager James Long, Respondent's top management official, did not learn of it until February 4.

On Monday, February 4, Respondent held a "brown bag" lunch at which Long addressed approximately 25 employees concerning Respondent's operations. During a question-and-answer session following the address, Malloy asked what management's attitude would be toward the formation of a company union. Long was visibly upset by the question and indicated that he did not think a union was necessary. Malloy then stated that a union would enable employees to bargain for wage increases, and, after another employee noted the advantages of unionization, Malloy related his understanding of how collective bargaining operated at another location.

Immediately after the brown bag lunch, Long met with Denton and Seville and said, "[w]ho the hell does he think he is, asking to form a union at TERA." With Denton urging that Malloy be fired, Long then stated, "[g]ive me his file, his personnel file, give me Dan Malloy's personnel file. I have had it. I have had it." The Administrative Law Judge found that at some point during this conversation Denton informed Long about the paycheck incident. The Administrative Law Judge also found that Long decided to discharge Malloy sometime during the afternoon of February 4. On February 5, Long informed Data Manager Barbara Murray that he was discharging Malloy, and he instructed her to prepare a memorandum on Malloy's employment history. Long also instructed Supervisor Petrov to submit his recommendation, but in a memorandum Petrov observed that Malloy "has a point in maintaining that dismissal at this time is not justified," since his current work was sufficiently accurate and since he had not recently been a disruptive influence. Nonetheless, Long discharged Malloy at the close of business on February 5.

In finding that Respondent met its burden of demonstrating that it would have discharged Malloy even in the absence of his protected activity, the Administrative Law Judge relied, to a large extent, on Malloy's behavior during the paycheck incident. Contrary to the Administrative Law Judge, we find that Respondent has failed to dem-

[1] Unless otherwise specified, all dates herein refer to 1980.

onstrate that it relied on this incident as a basis for the decision.

We note initially that the Administrative Law Judge did not pinpoint the precise time at which the discharge decision was made, finding only that Long arrived at his decision sometime "on the afternoon of February 4." We find merit to the General Counsel's contention that Long decided to discharge Malloy at the precise moment that he demanded Malloy's personnel file and declared that he had "had it," during the conversation with Denton and Seville following the brown bag lunch. Our finding in this regard is grounded in the circumstances in which the remarks were made. Thus, Malloy's comments had caused Long to be visibly upset both during and after the brown bag lunch. Long's remarks were made immediately after Malloy had engaged in protected conduct, and the decisive manner in which they were uttered indicated that a final disposition of the issue was forthcoming. In these circumstances, Long's demand for the file and his declaration that he had "had it" cannot be interpreted as manifesting anything other than a firm resolve to discharge Malloy.

The Administrative Law Judge also found that Denton informed Long of the paycheck incident for the first time during the course of this same conversation, but again he did not specify the precise time at which Denton did so. He found only that Long "may" have been informed prior to demanding Malloy's personnel file and declaring that he had "had it." After a careful review of the record, we find no evidence that Long had been apprised of the paycheck incident prior to that moment, which, as we have found, was the moment at which the discharge decision was made. Therefore, since Respondent has not established that Long was aware of the paycheck incident at that time, it has not demonstrated that the incident was a motivating factor in the decision to discharge Malloy.[2]

The Administrative Law Judge also found that, in deciding to discharge Malloy, Respondent relied on Malloy's "probationary status, failure to sustain an acceptable level of performance, and other problems Respondent had had with him as an employee."[3] For the reasons below, we also find that Long did not consider these factors at the time he made his decision.

While it is undisputed that Malloy had an inconsistent performance record, it is also established that on Friday, February 1, Respondent had decided to extend Malloy's probationary period after his supervisor, Petrov, had judged his most recent work acceptable and had noted that a previous warning about socializing had made an impression on him.[4] In these circumstances, we cannot find that Malloy's performance, which had been found sufficiently acceptable to warrant an indefinite extension of his probationary period on February 1, suddenly formed a part of the basis for the decision to discharge him only 3 days later. The recent extension of the probationary period also precludes a finding that Respondent relied on Malloy's continuing probationary status in making its decision. Moreover, the record discloses no evidence that Long considered Malloy's performance problems or probationary status at the time he stated that he had "had it" during his conversation with Seville and Denton. On the contrary, the evidence indicates only that Malloy's comments about unionization were discussed at the moment that Long made his decision.

Consideration must also be given to the fact that much of the evidence used to justify the discharge was not gathered until the day after the decision was made. As the Administrative Law Judge found, Long informed Murray of his decision on the morning of February 5 and instructed her to prepare a memorandum setting forth everything she knew about Malloy. It was this memorandum which labeled Malloy's performance record as "generally unacceptable," noted his "sloppy handwriting," asserted that he had abused compensatory time and other privileges, and observed that he had engaged in excessive socializing. We do not suggest that Long was completely unaware of Malloy's performance and other miscellaneous problems until February 5. However, the fact that Long ordered the preparation of the memorandum after the decision had been made, when coupled with the absence of evidence that these problems were considered at the time of the decision, indicates that Respondent offered the problems listed in the memorandum as mere afterthoughts.

[2] The Administrative Law Judge credited Long's testimony that he would have discharged Malloy upon learning of the paycheck incident, even in the absence of the protected activity. We find that the Administrative Law Judge's credibility resolution in this regard is of no consequence, since it has not been established that Long knew of the paycheck incident at the time he decided to discharge Malloy. In discerning an employer's motive for a disciplinary action, we analyze only those factors which the employer considered at the time the action was taken. Whether an employee would have been discharged for conduct occurring after the disciplinary decision, or for conduct of which the employer was not apprised until after the decision, is speculative and is not relevant to our inquiry.

[3] In using the phrase "other problems," the Administrative Law Judge was apparently referring to the items listed in Supervisor Murray's memo of February 5, discussed *infra*.

[4] In this connection we also note Long's testimony that in the absence of the paycheck incident, which has not been shown to be a motivating factor, he would not have disturbed the decision of February 1 to extend Malloy's probationary period.

Finally, the Board has traditionally viewed the timing of a discharge as one element to be weighed in discerning an employer's motivation.[5] Here the decision to discharge Malloy was made immediately after he had raised the issue of unionization at the brown bag lunch. Long's decisive response to Malloy's comments, when viewed in conjunction with the preceding onsiderations, suggests that Respondent would not have discharged Malloy in the absence of his protected activity.

In view of the foregoing, we find that Respondent's asserted reasons for discharging Malloy were pretexts, and that it discharged him solely because he spoke out in favor of unionization. Accordingly, we find that by discharging Malloy Respondent violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent TERA Advanced Services Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Daniel J. Malloy because of his union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act, we shall order that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Accordingly, we shall order Respondent to offer Daniel J. Malloy immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and to make him whole for any loss of earnings he may have suffered as a result of the discrimination practiced against him by paying to him a sum equal to what he would have earned, less any net interim earnings, plus interest. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner described in *Florida Steel Corporation*, 231 NLRB 651 (1977).[6] In accordance with our decision in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), we shall also provide for a narrow cease-and-desist order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, TERA Advanced Services Corporation, Bethesda, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because they engage in union activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Daniel J. Malloy immediate and full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any losses incurred by reason of the discrimination practiced against him, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Bethesda, Maryland, facility copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order,

[5] *W. H. Scott d/b/a Scott's Wood Products*, 242 NLRB 1193, 1197 (1979); *Jeffrey P. Jenks d/b/a Jenks Cartage Company*, 219 NLRB 368 (1975).

[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

what steps Respondent has taken to comply herewith.

MEMBER FANNING, dissenting:

I think the Administrative Law Judge has fairly and reasonably analyzed the facts in this case and has arrived at the proper conclusion. I agree with him in his analysis and conclusion. Accordingly, I dissent from my colleagues' reversal of his decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge or otherwise discriminate against our employees because they engage in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Daniel J. Malloy immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed and WE WILL make him whole, with interest, for any losses incurred by reason of the discrimination practiced against him.

TERA ADVANCED SERVICES CORPORATION

DECISION

STATEMENT OF THE CASE

ARTHUR LEFF, Administrative Law Judge: Upon a charge filed by Daniel J. Malloy on February 27, 1980, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint, dated April 18, 1980, against TERA Advanced Services Corporation, Respondent herein, alleging that Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act by terminating the employment of the Charging Party on February 5, 1980. Respondent filed an answer denying the commission of the alleged unfair labor practices. A hearing on the complaint was held before me at Washington, D.C., on October 9 and 10, 1980. Briefs were filed by the General Counsel, Respondent, and the Charging Party on December 1, 1980.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a California corporation, is engaged at its Bethesda, Maryland, facility—its only facility involved herein—in providing techinical services to government agencies. During the 12-month period preceding the issuance of the complaint, Respondent received in excess of $50,000 for services provided by its Bethesda facility for customers located outside the State of Maryland. Respondent admits that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it is so found.

II. THE UNFAIR LABOR PRACTICES

A. *Introduction; the Issues*

As indicated above, the central issue in this case is whether Respondent violated Section 8(a)(1) and (3) of the Act by its discharge on February 5, 1980, of Daniel J. Malloy, an employee at its Bethesda, Maryland, facility. The complaint alleges more specifically that Respondent discharged Malloy because he engaged in protected concerted activity by attempting to interest fellow employees in union representation.

Respondent employs approximately 100 employees at its Bethesda facility. The employees have never been represented by any union and, so far as appears, no union effort has ever been made to organize them. The General Counsel makes no claim that Malloy at any time engaged in any activity to interest employees to seek union representation other than by his conduct at the meeting described below.

As will hereinafter be more fully detailed, on Monday, Feburary 4, 1980, Project Manager James A. Long, Respondent's top management official at its Bethesda facility, had a "brown bag" lunch meeting with some 25 employees of the facility to give them an overview of Respondent's national operations. At the conclusion of his address, Long invited questions from the employees about anything they wanted to talk about. Malloy asked Long how management would react to the formation of an employee union at the facility and also made certain comments indicating the desirability of having differences between management and employees relating to terms and conditions of employment resolved through the collective-bargaining process. Respondent discharged Malloy on Tuesday, Feburary 5, the day following the meeting. The General Counsel's basic position in this case is that Respondent's discharge action was motivated by Malloy's question and comments at the meeting; that

Malloy's conduct in that respect constituted protected concerted activity; and that, consequently, Respondent's discharge action must be ruled violative of Section 8(a)(1) and (3) of the Act.

Respondent does not dispute that Malloy asked the question and made the comments referred to above, but otherwise takes issue with the General Counsel's position in all respects. According to Respondent, Malloy's question and comments at the "brown bag" lunch played no role whatsoever in the discharge decision which was implemented on February 5. Respondent asserts that its discharge determination was based exclusively upon the following in combination: (1) Malloy's failure to sustain an acceptable level of performance (along with related considerations such as his poor attitude and excessive socializing) during the period of his employment, and (2) his profane outburst before a female employee on the Friday before his discharge when given a paycheck and a W-2 form containing a wrong addreess, the details of which will be reported below. Respondent further asserts that its determination to fire Malloy at the time it did was sparked, not by Malloy's conduct at the "brown bag" lunch, but by the paycheck incident which, according to Respondent, was first brought to the attention of Long, who made that determination, shortly after the conclusion of the "brown bag" lunch. Respondent insists that it would have taken the action it did, at the time it did, and for the reasons it did, whether or not Malloy had asked the question and made the comments claimed by the General Counsel to have been the cause of the discharge.

With the respective positions of the parties thus clarified, I now turn to a more detailed consideration of the relevant facts as reflected by the evidence in this record that I find credible.

B. *The Relevant Facts*

1. Malloy's work history

Malloy was employed by Respondent from September 25, 1978, until his discharge on February 4, 1980, at its Bethesda, Maryland, facility, where Respondent is engaged in processing documents and performing related work for the Nuclear Regulatory Commission. Except for a brief period when he was assigned to quality control work, Malloy's job throughout his employment was that of a coder; his function as such was to review documents, extract certain data elements therefrom, and report them on a coding form. Malloy's immediate supervisor during the last 3 months of his employment was George Petrov. Above Petrov in the supervisory chain of command over Malloy were Barbara Murray, the data manager, and Michael Seville, the operations manager, in that order. As earlier noted, James A. Long, now also a vice president of Respondent, was the project manager and top management official at the Bethesda facility.

Respondent's evaluation records of Malloy, which are in evidence, support Respondent's contention that Malloy had a history of inconsistent and at times substandard performance during the period of his employment. On his first evaluation in late January 1979, he was rated below average in productivity, average in attitude, and given a warning. About a week later, he was told he was being terminated because of low productivity, but that action was later rescinded when it was determined that the statistics relating to his productivity had been inaccurately compiled. Several weeks later, his work was reevaluated and his performance was found to be acceptable. On May 15, 1979, he was rated average in all respects and given a salary increase of $1,000 per annum. The May evaluation report notes that he had been moved to a quality control position because of the high quality of encoding work he had demonstrated, and that he performed well in quality control. It appears that Malloy worked in quality control until September and then was transferred back to his previous position as a coder because due to an injury he was working only a 25-hour week at that time and Respondent wanted a full-time employee in his quality control position. On July 10, 1979, Malloy was rated below average in productivity and attitude, and it was noted that his inconsistent performance was again a problem; that he seemed to respond to corrective counseling, but only for short periods, and that he occasionally demonstrated a negative attitude. A followup review was scheduled for August, but apparently was not conducted. So far as appears, no further review or evaluation of Malloy's work was thereafter made until January 1980. Malloy testified without contradiction that during the intervening period no management representative criticized the quality of his work.

In early or mid-January of 1980, Petrov reviewed the work of his five-member coding team and found Malloy to be the least accurate member of the team. At that time, Petrov directed Malloy's attention to the fact that he was making too many mistakes. At about that time, Petrov also discussed Malloy's situation with his supervisors, Murray and Seville. A consensus was reached to give him a warning and put him on probation for a 2-or 3-week period to see whether there was any improvement in his work. Toward that end, a formal review and evaluation of Malloy's work was conducted on January 25, 1980. Malloy's performance was rated below average. Petrov and Seville were instructed to give Malloy a "final warning." A followup was scheduled for February 1.[1]

On Friday, February 1, Petrov again reviewed Malloy's work. Petrov, as appears from his testimony, found that the coding forms which Malloy had most recently produced, but which he had not theretofore seen, were acceptable. Petrov also had a conversation with Malloy that day about Malloy's socializing on the job and Malloy assured him that he would "maintain a more professional attitude in the future." Petrov concluded that the warning and "stern talk" given Malloy had made an impression on Malloy, and that Malloy should be given a further chance before any adverse action was taken against him. Accordingly, Petrov recommended to Seville, the facility's operations manager, that Malloy's pro-

[1] The January 25, 1980, evaluation report, in addition to referring to the "poor quality" of Malloy's work, also states that his "attitude" was presenting a "serious problem." The only specific evidence presented by Respondent to support that assertion was Petrov's testimony that during that period he was also concerned about Malloy's excessive socializing on the job and the disruptive effect that this was having on the work of other employees.

bationary period be extended and that no further action be taken against him at that time. Seville concurred, and approved Petrov's recommendation.[2]

2. The paycheck incident

On Friday, February 1, Linda Robb distributed to the facility's employees their paychecks, along with their W-2 forms. Robb was then an assistant to Delores Denton (Dee), the administrative manager of the facility's records office where payroll and like personnel records are prepared and maintained. Robb delivered to Malloy his check and W-2 form shortly before noon that day. Malloy's W-2 form contained an address no longer applicable to him. About 2 months before, Malloy had moved to a new address. He had twice requested Denton to have his address changed on Respondent's records, but this had not been done.

Malloy's back was to Robb when she laid his check and W-2 form on his desk. As Robb was turning to leave, Malloy picked up the envelope containing the W-2 form, observed the wrong address, and blurted out in a loud voice: "Those dumb fuckers up front, they never do anything right. I ought to go up and kick Dee's ass."[3] Robb testified that Malloy was looking down at the W-2 form and not at her when he made that exclamation. According to Malloy, his exclamation was simply a spontaneous outburst of irritation and was not addressed to Robb or anyone else. Respondent offered no evidence that any employee other than Robb heard or reacted in any way to Malloy's outburst. There is no indication in the record that Malloy was given to cursing on the job. Malloy's testimony that, except on this one occasion, he had never cursed in the office was not challenged by Respondent at the hearing.

Robb testified that she was "shocked" by the language Malloy had used as well as the tone of his voice. After completing her distribution of paychecks, Robb reported the incident to Denton. Shortly thereafter, Denton came to Malloy's desk and angrily told him that she did not appreciate what he had said in Robb's presence and that she felt his language and behavior were uncalled for. Shortly thereafter, Denton informed Barbara Murray about the paycheck episode, stating that if Malloy were under her supervision she would fire him. Murray, in turn, reported the incident to Operations Manager Seville who earlier that day had discussed Malloy's situation with Petrov and had approved Petrov's recommendation that no further action be taken against Malloy at that time and that his probationary period be extended. As appears from Murray's testimony, Seville, who had the authority to fire Malloy, simply expressed surprise that Malloy had given vent to an outburst of that kind. Apparently, he did not then consider the incident serious enough to warrant overturning his earlier approval of Petrov's recommendation.

Respondent introduced into evidence a memorandum from Denton to Long calling the latter's attention to the paycheck incident. The memorandum is dated February 1, 1980. Long testified, however, that he did not actually see this memorandum or learn of the paycheck incident until the afternoon of the following Monday, shortly after the "brown bag" lunch. By way of explanation, he testified that he was busy and behind closed doors all Friday afternoon and might not have been in his office during most of Monday morning. Denton, although still in the employ of Respondent at the time of the hearing, was not called as a witness by Respondent to corroborate Long's testimony in this respect. There is no specific evidence in the record, however, to impeach Long's testimony about when he learned of the paycheck incident. I accept his testimony that he was not made aware of the paycheck incident until after the "brown bag" lunch.

3. The "brown bag" lunch

On Monday, February 4, 1980, Malloy, along with approximately 25 other employees, attended a "brown bag" lunch called by management at which Long spoke to the employees about Respondent's nationwide operations. Long completed his address in about half an hour and then invited questions from the assembled employees about anything they wanted to talk about. About 10 minutes into the question period, Malloy asked, "What would the management attitude be toward the formation of an employee union?" Long was visibly upset by the question. He responded in substance that he saw no need for a union at TERA as the Company had always had an open door policy. Long indicated that he was curious about why the employees would want a union. Malloy pointed out that when annual salary reviews came up the employees would be in a position to bargain for increases. Another employee, John Milligan, then raised a question concerning the Company's policies about compensatory time, and mentioned that this was another area where "union type" bargaining by the employees might be desirable. Malloy also commented further about the desirability and advantages to employees of collective bargaining by describing how it operated at the Bricklayers' Union where a friend of his worked.[4]

[2] Petrov testified that this was the first conversation he had with Seville that morning. He further testified that no actual decision had earlier been reached to fire Malloy. His testimony in these respects varied from that of Murray who testified that at a meeting that morning, which she, Seville, and Petrov attended, a decision was actually reached to fire Malloy that day, that Petrov had been directed to implement that decision; but that Petrov later that morning had "backed down" and decided to give Malloy a further chance. On cross-examination Murray agreed, however, that the "decision" asserted by her to have been made on Friday morning was canceled out later that morning with the approval of Seville who had the final say. Seville was not called by Respondent as a witness. To the extent that Murray's testimony differs from that of Petrov, I credit the latter who impressed me by his overall testimony as a more reliable witness. For like reasons, I do not credit Long's testimony that on Friday, February 1, he was informed by Seville that a decision, to be implemented by Petrov, had been made to fire Malloy that day, and that he had approved that decision.

[3] The quoted language is from Robb's testimony which I accept in that regard. Malloy's recollection of the words he used is somewhat different, but not significantly so. His version: "Jesus Christ. Those dumb fuckers in California. I told Dee to put the right address on this."

[4] This finding is based on a synthesis of the testimony I find credible given by Malloy, as a witness for the General Counsel, and by Long, Linda Hillegas, and Olivia Nevins, as witnesses for Respondent. I do not credit that portion of Long's testimony which states that he responded, in part, that he would be happy to have the employees form a union if they wanted to. Long's testimony to that effect is not supported by the testimony of any of the other witnesses.

4. Subsequent events

To support his claim that there was a causal relationship between Malloy's question and comments at the lunch meeting and his discharge the following day, the General Counsel called Valda Wisdom as a witness. Wisdom, at the time material herein, was employed by Respondent as a supervisor but was no longer with Respondent when the hearing was held, having several months earlier voluntarily and on good terms quit Respondent's employ to take a better job. Wisdom's desk at Respondent's office was located about 5 to 10 feet from Delores Denton's. Wisdom testified that when she returned to her desk after the conclusion of the "brown bag" lunch, she found Long, Seville, and Denton at Denton's desk engaged in a conversation about what had occurred at the meeting. That conversation, she testified, lasted about 10 minutes. This is her account of what she heard said:

> Mr. Long was upset about what was asked about the unionizing at TERA and he said who the hell does he think he is, asking to form a union at TERA. Then I heard Mike Seville say that, let them go ahead and have their union. They are too small to unionize anyway. At that point I heard Jim Long say, give me his file, his personnel file, give me Dan Malloy's personnel file. I have had it. I have had it. And Delores Denton said, fire him, fire him, fire him.

Wisdom's aforesaid testimony stands on this record uncontradicted. Seville and Denton were not called by Respondent as witnesses, although at the time of the hearing they were still in Respondent's employ and not shown to have been unavailable. In his testimony Long did not specifically advert to Wisdom's testimony or deny making the statements she attributed to him.[5] Long did testify, however, that he had a conversation with Seville and Denton after the "brown bag" lunch meeting in which he expressed his resentment of the "hostility" Malloy had shown at that meeting. It was during the course of that conversation, according to Long, that Denton asked him whether he had seen her memo or heard about the Friday paycheck incident, and, when he said he had not, had apprised him for the first time of that incident. Although Long fixed the time of his conversation with Denton and Seville as "sometime in the first hour or maybe a little bit longer" after the conclusion of the lunch meeting, I am satisfied that it was the same conversation as the one to which Wisdom made reference.[6]

Wisdom was a disinterested witness and her testimony did not impress me as contrived. Other testimony given by Long also serves to lend credence to Wisdom's testimony that Long made the statement she attributed to him, reflecting his animosity toward Malloy for having raised the subject of a union at the lunch meeting. Thus, Long conceded that he was "upset" by Malloy's question and comments at the meeting. And at various points in his testimony he stated that he regarded Malloy's conduct at the meeting as "disruptive," as "very aggressive," and as having demonstrated a "poor attitude" and "hostility" on Malloy's part toward Respondent.

For the reasons indicated above, I credit Wisdom's aforesaid account of what she heard Long say. In doing so, however, I bear in mind that Wisdom's account is on its face an abbreviated and condensed summary of a 10-minute conversation and may not detail everything that was said. My finding, therefore, is not to be read as rejecting Long's testimony that in the course of the conversation Denton directed his attention for the first time to the paycheck incident, and it may well be that this was done before Long said, "I have had it."

The decision to discharge Malloy, although not effected until the following day, was made by Long on the afternoon of February 4. On that afternoon, Long, according to his testimony, told Seville that he had been informed of the paycheck incident; that he intended to discharge Malloy; and that he wanted the "final recommendations" from Malloy's supervisors that had been due Friday by the following morning.

On Tuesday morning, February 5, Long summoned Murray to his office. Long told Murray that he had decided to discharge Malloy and that he needed a memorandum from her. He asked her to write out everything she knew about Malloy. Later that day Murray prepared and submitted to Long a memorandum detailing the problems which she asserted supervisors had had with Malloy, covering the full 15-month tenure of his employment, including the period prior to May 1979 when, the record shows, Murray first became his supervisor. In her memo, Murray stated that Malloy's work performance had been inconsistent and "generally unacceptable" in quality; that he had a "sloppy handwriting," that on occasions he had abused comp time and other privileges; and that he had engaged in excessive socializing that had a disruptive impact on the work of other employees. Murray's memo then went on to point out that Petrov, after seeing some "slight improvement" in Malloy's work had, on the preceding Friday, given Malloy "his very last chance to improve his attitude and unacceptable work habits," but that Malloy later that day had engaged

[5] Respondent did through other witnesses attempt to refute Wisdom's testimony, but I find the testimony given by these witnesses to be of insufficient probative force to undermine Wisdom's credibility. Linda Hillegas, whose desk was adjacent to Wisdom's, testified that after the "brown bag" lunch she returned to her desk with Wisdom, but did not at that point "hear" any conversation taking place at Denton's desk. Linda Robb, whose desk was also close to Wisdom's, testified that she could not "recall" hearing Long engage in any discussion at Denton's desk on February 4, 1980. Little weight can be attached to the testimony of these witnesses. They may have been on the phone or absorbed in other work at the time, or they may not have paid attention to what was going on at Denton's desk for other reasons. Or if they did hear it, the subject may have been of insufficient interest to them to retain a recollection of it over the 8-month period that elapsed between the date of that occurrence and the date of hearing.

[6] Considering the nature of the conversation, even as related by Long, I believe it more likely that it took place very shortly after the lunch meeting, as testified by Wisdom, rather than at the time stated by Long. My belief in that regard is buttressed by the following quotation from Respondent's opening statement:

> Mr. Long came out of the meeting and he said what's happened on the probationary aspect of Mr. Malloy? He really had a bad attitude at the meeting. Whereupon one of the supervisors said, did you hear what happened Friday. He's got to go.

in the paycheck incident. Murray wound up her memo by stating that in her belief, Malloy during his 15 months' employment had been given every opportunity to improve, but had failed. Although Murray's memorandum was requested by Long and written by her on February 5, it was predated February 4. The reason for this was not explained. The memo, as dated, would have made it appear that it was requested by Long and written prior to Malloy's question and comments at the "brown bag" lunch.

Petrov, who had been absent on Monday, was also summoned to Long's office on Tuesday morning, February 5, and asked by Long to submit his recommendation. Malloy was aware that Petrov had been called to Long's office that morning and had spent considerable time with him. As Petrov was leaving for lunch that day, Malloy followed him to the elevator bank and, as appears from Malloy's undisputed and credited testimony, had the following conversation with him:

> I said to him, I imagine by now that you have heard what I said at the meeting yesterday. He said, yes, I have. That was most unfortunate, and I said, well what is going to happen. He said, they have decided to lower the boom. I said, but surely they can't for just expressing my right of free speech. He said, well there's a lot of reasons. It's that, it's poor work, there was an incident where you cursed, you abused compensatory time. I tried to make brief objection to these things, but as I say, the elevator came.

Later that day, Petrov submitted his memorandum to Long. In it Petrov stated that Malloy had received two warnings from him, one several weeks before about the quality of his work, and the other the preceding Friday about excessive socializing. He pointed out that since the time of his first warning Malloy's work had improved to the point of being acceptable, and that Malloy had responded favorably to his second warning by promising "that he would maintain a more professional demeanor in the future." Petrov concluded his memorandum with the following statement:

> Since his current work does meet my standards of accuracy and—in the past few days anyhow—he has not been a disruptive influence, I would suggest that he has a point in maintaining that dismissal at this time is not justified.

At Respondent's facility, the recommendation of an employee's immediate supervisor is ordinarily given substantial weight in determining whether an employee should be discharged. Petrov's recommendation, however, did not alter the determination which Long had earlier reached to discharge Malloy.[7]

[7] Long testified that he was surprised by Petrov's memo because when he met with him earlier that day Petrov had agreed that Malloy should be discharged.

5. The discharge

At the close of business on Tuesday, February 5, Malloy was summoned to Long's office. Seville was also there at the time. Long informed Malloy that he was being discharged for poor performance; a bad attitude; and "disruptive" conduct. The specifications given him were essentially those which Murray had supplied Long in her memorandum that day. The payroll incident was among the reasons cited by Long as having contributed to his discharge decision. Even though Malloy denied this to be so, Long repeatedly stressed that Malloy appear to have a "hostile" attitude toward Respondent. When Malloy remarked that he felt he was really being fired because of what he had said about a union at the "brown bag" lunch, Seville, as appears from Malloy's credited testimony, brushed his remark aside with the comment, "Oh, we know this was just a joke."[8] Malloy's discharge was made effective immediately although he was told he would be paid to the end of the week.

6. Long's testimony relating to his reasons for the discharge

Before turning to an analysis of the facts of this case, the following items of testimony given by Long, and not previously reported, should be noted.

Long testified that his determination to discharge Malloy was based exclusively on Malloy's past inconsistent performance and "poor attitude" as an employee, coupled with the paycheck incident. Malloy's question and comments at the "brown bag" lunch, Long further testified, had no impact at all on his discharge decision, which, he added, would have been the same even if there had been no "brown bag" lunch meeting.

Long also testified in the end, although he had given variable and inconsistent testimony on this point as a 611(c) witness, that had the paycheck incident not occurred, he would not have disturbed the recommendation made by Petrov and approved by Seville on Friday, February 1, to extend Malloy's probationary period, and that Malloy would have remained in Respondent's employ until the next time he stepped out of line or his productivity again went down.

Long further testified that when he learned of Malloy's cursing episode he decided that that was "the last bit of disruptive conduct" he was going to tolerate from Malloy. Long made no claim that Malloy had ever cursed or engaged in similar conduct before. But, he explained, he considered Malloy's outburst "disruptive" because it had occurred "in the presence of a young lady" and in the operations area. Long had had no prior occasion to deal with that type of conduct because it had never occurred before. Had it been "a first time incident of a good employee," testified Long, he would have simply warned the employee not to do it again, but in the case of Malloy he regarded it as "the last straw" because of Malloy's past inconsistent performance and other problems Respondent had had with him during the 15-month tenure of his employment.

[8] Long's testimony that it was Malloy, not Seville, who said he was joking at the "brown bag" lunch is not credited.

The validity and weight to be given to Long's testimony in the foregoing respects will be dealt with in the next section of this Decision.

C. *Analysis and Concluding Findings*

The initial question in this case is whether Malloy engaged in activity protected by the Act at the "brown bag" luncheon by his questioning of Long as to how management would react to the formation of a union and his subsequent comments about the desirability and advantages to employees of collective bargaining. Malloy's question and comments, which were obviously intended for the ears, not only of Long, but of the assembled employees, not only indicated that he supported the idea of forming a union for the purpose of collective bargaining with Respondent, but in effect proposed to the employees that they give consideration to that idea as a means of furthering their mutual interests. There can be little doubt that Malloy's question and comments constituted protected activity within the meaning of Section 7 of the Act, which, *inter alia*, gives employees the right "to self-organization, to form . . . labor organizations . . . and to engage in other activities for the purpose of collective bargaining and other mutual aid and protection." The right to "self-organization" and to "form" labor organizations quite clearly encompasses the right to propose or suggest such self-organization or formation. And, as stated in *Owen-Corning Fiberglass Corporation* v. *N.L.R.B.*, 407 F.2d 1357, 1365 (4th Cir. 1969):

> The activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much "concerted activity" as is ordinary group activity. The one seldom exists without the other.

I find accordingly.

That brings me to the issue of whether there was a causal relationship between Malloy's protected activity, as found above, and his discharge the following day. The respective positions of the parties have been fully set forth in the introductory subsection of this Decision and need not now be repeated. I shall consider this issue in the light of the Board's causation test as set out in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

There can be little doubt from the record in this case that the General Counsel has made out a *prima facie* showing sufficient to support an inference that Malloy's protected activity at the "brown bag" lunch was a motivating factor in Respondent's decision to discharge him. Such an inference may fairly be drawn from the factual findings made above showing: (1) the close timing of the discharge in relationship to Malloy's protected activity; (2) Long's admission at the hearing that he was "upset" by Malloy's question and comments at the "brown bag" lunch and that he regarded Malloy's conduct at the meeting as "aggressive" and as having manifested a "poor attitude" and "hostility" toward Respondent; (3) Long's evident animus toward Malloy for having raised the question of a union at the meeting, as reflected by his irate declaration to Denton and Seville shortly after the meeting, "Who the hell does he think he is, asking to start a union at TERA"; and (4) Petrov's remark to Malloy at about noon on February 5, that it was "most unfortunate" that Malloy had said what he had at the "brown bag" lunch, together with his ensuing statement, in explanation of his remark, that Long had decided to "lower the boom" on Malloy for that among other reasons, including the paycheck incident.

The question remains, however, whether Respondent has sustained the evidentiary burden placed on it under the *Wright Line* causation test of demonstrating that it would have discharged Malloy even in the absence of Malloy's protected activity. Although I confess that this aspect of the case has been a troublesome one for me, I have after long and careful consideration come to the conclusion that an affirmative answer to the question posed above is justified by the evidence in this case—and this for the reasons to be stated below.

The record shows that at the time of his discharge, and for a substantial period preceding it, Malloy had been regarded by Respondent as a marginal employee. As shown by the findings made above, throughout the period of his employment Malloy had a record of inconsistent and often substandard performance. Respondent also had problems with Malloy's job behavior, such as his tendency to engage in excessive socializing that had a disruptive effect on the work of other employees. Several weeks before his discharge, Malloy had been warned about the poor quality of his work and had been placed on probation for a 2- or 3-week period. During the last week of January 1980, serious consideration had been given by his supervisors to terminating him at the end of that week. However, on Friday morning, February 1, Petrov had observed an improvement in the quality of Malloy's most recent work and, with the approval of Seville, had extended his probationary period indefinitely. However, Petrov found it necessary that day to warn Malloy about his excessive socializing, which had grown out of hand, and had also cautioned him about the importance of maintaining a good job attitude. At that time, Malloy promised that he would "maintain a more professional demeanor in the future."

Malloy's paycheck outburst occurred about 2 hours or so after his conversation with Petrov that same Friday. The hostile and obscene language Malloy used in the presence of Robb in expressing his irritation with Denton and her staff over the error on his W-2 form cannot in this case be lightly brushed aside as a trivial matter. Malloy's own testimony shows that Denton, the administrative manager at the facility, was infuriated by the profane and hateful language he had used in the presence of Robb, and regarded it as serious misconduct on his part. Denton, not only complained about Malloy's conduct to Murray, to whom she expressed her opinion that Malloy should be fired for it, but also prepared a written complaint about the incident addressed to Long.

In light of the foregoing facts, I believe that Long, when made aware of the paycheck incident the following Monday, could honestly have viewed Malloy's profane and abusive outburst not only as giving Respondent proper cause for disciplinary action, but also as a "last

straw" warranting discharge action, when considered in conjunction with Malloy's probationary status, failure to sustain an acceptable level of performance, and other problems Respondent had had with him as an employee.[9] In these circumstances, I am unable to regard Long's discharge decision as so devoid of legitimate business justification as to negate the plausibility of his testimony that he would have discharged Malloy upon learning of the paycheck incident even if there had been no "brown bag" lunch. Accordingly, I credit Long's testimony in that respect, and on the basis of his testimony and the evidentiary support for it in this record, I find that Respondent has successfully demonstrated that it would have discharged Malloy at the time it did and for the legitimate reasons it asserts it did even in the absence of his union activities.

It follows, as I read the Board's *Wright Line* causation test, that Malloy's discharge must be found to be nondiscriminatory even though, as the evidence in this record shows, Long was displeased with Malloy's questions and comments at the "brown bag" lunch found above to constitute protected activity and may for that reason also have welcomed Malloy's discharge. (See *Mt. Healthy City School District Board of Education*, 429 U.S. 274, 285 (1977), and the quotation therefrom in *Wright Line, supra* at 1086.)

For the reasons stated above, I conclude and find that the General Counsel has failed to satisfy the ultimate burden imposed on him of establishing the complaint's unfair labor practices allegations by a preponderance of the evidence (*Wright Line, supra*, fn. 11). Accordingly, I shall recommend dismissal of the complaint.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent has not, as alleged in the complaint, engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

[Recommended Order for dismissal omitted from publication.]

[9] The record does show, to be sure, that on Friday when Murray reported to Seville Denton's complaint about Malloy's cursing conduct in the presence of a member of her staff, Seville merely expressed surprise and apparently did not then regard Malloy's behavior as a matter of serious enough consequence to reverse his earlier approval that day of Petrov's recommendation that no action be taken at that time against Malloy and that Malloy's probationary period be extended indefinitely. This is an item of evidence that has given me some pause in the conclusion I reach here, since it may be construed as an indication that Long would have similarly evaluated Malloy's cursing conduct were it not for Malloy's intervening protected activity. However, I do not think such an inference is reasonably warranted for two reasons: First, Long was Seville's superior and, therefore, not bound by his judgment. Second, Seville and Denton each headed separate staffs at Respondent's facility, Seville the operations staff, and Denton the administrative staff. As project manager, Long could be expected to have a greater sense of obligation to correct grievances emanating from the administrative staff, as well as to support the recommendation of the manager of that staff.